FILED
SEP 11 1984
ALEXANDER L. STEVAS, CLERK

No. 84-5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EDNA GOLDSTEIN,

Petitioner,

v.

ROBERT E. KELLEHER, ROCKDALE MEDICAL CORPORATION and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER

SKIP SHORT
Counsel of Record
SHORT & BILLY
275 Madison Avenue
New York, New York 10016
(212) 679-8400

JOHN GRANARA
5 High Street
Medford, Massachusetts 02155
(617) 391-7000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 84-5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EDNA GOLDSTEIN,

Petitioner,

v.

ROBERT E. KELLEHER, ROCKDALE MEDICAL CORPORATION and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER

Summary

Two issues are presented in this case that have never previously been addressed by this Court. Both are of paramount significance in constitutional law and should be decided by this Court.

The contention that only the judges of the Supreme Court—and not the decisionmakers of the district courts—need be appointed by the President and confirmed by the Senate is contrary to the records of the Constitutional Convention and to the opinions of this Court which have indirectly addressed the issue.

The contention that the framework of the government, as prescribed by Articles II and III, may be altered by a law of Congress and the consent of individual litigants has not been addressed by this Court. Nevertheless, the

contention is directly contrary to the role and authority of Articles II and III of the Constitution.

In their effort to convince this Court to refuse to consider these two fundamental issues of constitutional law, the Defendants and the Government have ignored the analysis presented in the Petition concerning these issues. That analysis, which the Defendants and the Government do not discuss or attempt to dispute, supports the granting of this Petition because it raises issues of profound constitutional importance.

While the Defendants and the Government have ignored this analysis, they do raise three contentions which are inaccurate and should be addressed in this Reply Brief pursuant to Supreme Court Rule 22.5.

1. This Court Has Not Held That Decisionmakers of the District Courts Need Not Be Appointed by the President and Confirmed by the Senate.

Although the Government made no mention of the Petitioner's Article II analysis, it did incorporate by reference its Brief in Opposition in *Foreman* v. *Collins*, 729 F.2d 108 (2d Cir., 1984), petition for cert. pending, No. 83-1616. In footnote 19 of that brief, the Government cited *Rice* v. *Ames*, 180 U.S. 371, 378 (1901) in support of its position that the President need not appoint and the Senate need not confirm decisionmakers of the district courts. The citation is completely inapposite.

First, *Rice* v. *Ames* concerned the appointment of commissioners who did not exercise the judicial power of the United States. See *TPO, Inc.* v. *McMillen*, 460 F.2d 348 (7th Cir., 1972) for a discussion of the differences in the authority exercised by commissioners and magistrates even prior to the enactment of Section 636(c) of the Federal Magistrate Act of 1979, 28 U.S.C. §636(c)(Supp. V 1981).

Second, the parties in *Rice* v. *Ames* agreed that the commissioner was not exercising the judicial power of the United States. See Appellee's Brief on Motion to Dismiss

at 8, *Rice* v. *Ames* ("An examining magistrate, such as a commissioner, is not a court in the real sense of that word. The commissioner who hears application for extradition is in no sense trying the prisoners.") The cases cited by the Appellee in *Rice* v. *Ames (Id.)* support this conclusion. See *Benson* v. *McMahon*, 127 U.S. 457, 463 (1888); *United States* v. *Ferreira*, 54 U.S. (13 How.) 46 (1851); and *In Re Kaine*, 55 U.S. (14 How.) 103 (1852). See also Appellant's Brief in Answer to Motion to Dismiss at 25-26, *Rice* v. *Ames* ("The appointment of Mark A. Foote to act in extradition matters by the district judge . . . did not make him a District Court or confer upon him powers of a district judge . . .").

Third, the Court specifically stated in *Rice* v. *Ames* that the commissioners presented in that case were "not judges in the constitutional sense". (at 378) They simply did not exercise the judicial power that the magistrates presently exercise under §636(c).

Rice v. *Ames*, the only Article II analysis presented by the Government, fails to support its position.

2. *Goldstein* v. *Kelleher* Conflicts With *Glover* v. *Alabama Board of Corrections.*

Both the Defendants and the Government rely almost exclusively upon their contention that this Court should not address the issues presented in this case because no conflict exists among the circuits.[1] In their attempt to support that contention, the Defendants distort the record and both the Defendants and the Government misconstrue

[1] There has been sharp disagreement in several of the circuits that have upheld the constitutionality of Section 636. See the initial decision in *Pacemaker Diagnostic Clinic, Inc.* v. *Instromedix, Inc.*, 712 F.2d 1305 (9th Cir., 1983); the dissent in the en banc panel, *Pacemaker Diagnostic Clinic, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 547 (9th Cir., 1984), petition for cert. pending, No. 83-1873; the dissent in *Lehman Bros. Kuhn Loeb, Inc.* v. *Clark Oil & Refining Corp.*, No. 83-1874 (8th Cir., July 11, 1984) (en banc); and the dissent in *Geras* v. *Lafayette Display Fixtures, Inc.*, No. 83-2728 (7th Cir., August 23, 1984).

Glover v. *Alabama Bd. of Corrections,* 660 F.2d 120 (5th Cir., 1981).

The Defendants contend that the failure to conform to the requirements of §636(c), which *Glover* refused to permit, was not raised below. The Defendants are wrong.

In the Petitioner's Supplemental Submission, allowed on motion by the First Circuit, the Petitioner argued that:

> This procedure—in which the reference was first suggested by the District Court Judge, not anonymously by the Clerk of the Court—was the same procedure utilized by the District Court in *Glover* v. *Board of Corrections,* 660 F.2d 120 (5th Cir., 1981). Although there was litigant consent in *Glover* the consent was narrowly construed by the Fifth Circuit due to the lack of compliance with the procedure of 28 U.S.C. §636(c)(2) and the Fifth Circuit's reservations about exercise of the judicial power by non-Article III judges. (See p. 124)
>
> Plaintiff's Supplemental Submission at 2-3, *Goldstein* v. *Kelleher,* 728 F.2d 32 (1st Cir., 1984).

The Defendants are also wrong in attempting to minimize the significance of this issue. The procedure followed in *Goldstein,* in which the reference was initiated by the judge, not the clerk of the court, is not unique to this case. This procedure is permitted by Massachusetts District Court Local Rule 4(c)(2)—which directly conflicts with the legislative history of the blind consent provision of §636(c)(2). [See citations in Petition at 31.]

Finally, the Defendants and the Government contend that *Goldstein* does not conflict with *Glover.* However, *Glover* can only be read as requiring that before a magistrate may act as a district court judge, the provisions of §636(c) must be complied with. The procedure in *Goldstein* did not comply with §636(c)(2) and the acceptance of that noncompliance conflicts with *Glover.*

3. The Citation of the Interim Bankruptcy Rules by the Government Is Inapposite.

In its Brief in Opposition in *Foreman* v. *Collins* (at 13, fn. 20), which the Government incorporated by reference in this case, the Government argued that the power to withdraw a reference under the interim bankruptcy rules was relied upon by the Sixth Circuit in *White Motor Corp.* v. *Citibank, N.A.*, 704 F.2d 254, 263 (6th Cir., 1983) in upholding the rule against an Article III challenge, and is analogous to the Magistrate Act.

However, in citing *White Motor Corp.* v. *Citibank, N.A.*, the Government neglects to explain that the interim bankruptcy rules the Sixth Circuit considered had three substantial differences from the Magistrate Act. First, non-traditional bankruptcy issues could not be adjudicated by a non-Article III judge. Second, references could be revoked for *any reason*, not based solely upon extraordinary circumstances. Third, as the Sixth Circuit stated:

> . . . even in traditional bankruptcy cases, the district courts may hold a hearing and receive evidence in cases first adjudicated by the bankruptcy court. The district court need give no deference to the bankruptcy judge's factual findings or interpretations of the law. The district court may modify, in whole or in part, any order or judgment issued by the bankruptcy judge. (at 263)

Thus, the interim bankruptcy rules sustained in *White Motor Corp.* v. *Citibank, N.A.*, are analogous to the Magistrates Act upheld in *United States* v. *Raddatz*, 447 U.S. 667 (1980), which provided for de novo review by the district court. They do not, however, resemble the Magistrate Act of 1979, and the citation of these rules as support for the constitutionality of the 1979 Act is inapposite.

CONCLUSION

For the reasons set forth in support of the Petition and in this Reply Brief, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SKIP SHORT
Counsel of Record
SHORT & BILLY
275 Madison Avenue
New York, New York 10016
(212) 679-8400

JOHN GRANARA
5 High Street
Medford, Massachusetts 02155
(617) 391-7000

Dated: September 7, 1984